Taj Hospital v Ketua Pengarah Kesihatan, Kementerian Kesihatan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–21–51 OF 2002
KANG HWEE GEE J
25 OCTOBER 2007

Public Authorities — Tort — Negligence — Duty of care — Director of Health failing to renew licence of private hospital promptly — Whether Director of Health owed common law duty of care to private hospital to issue licence promptly — Whether Director of Health negligent in failing to renew licence of private hospital promptly

Tort — Negligence — Damages — Private hospital unable to operate legitimately due to negligence of public authority in delaying renewal of licence — Whether loss and damages occasioned to private hospital ought to be presumed

Tort — Negligence — Duty of care — Whether Director of Health owes common law duty of care to private hospital to renew licence promptly — Whether private hospital would suffer damages if licence not issued promptly

The plaintiff was a private hospital. It applied to the first defendant for renewal of its licence for, inter alia, the period of 30 September 2000 to 29 September 2001. The plaintiff made its application on 1 September 2000 on the requisite form. On 8 December 2000 the first defendant inspected the plaintiff's premises and on 14 December 2000, the District Health Officer — an officer of the first defendant — certified that the plaintiff's premises fit for use as a private hospital. On 26 December 2000, the State Health Office requested from the plaintiff several documents, viz a valid fire prevention certificate and copies of the plaintiff's nursing aides' identity cards. The plaintiff sent these documents through the District Health Office on 25 January 2001. However, on 12 February 2001, the first defendant notified the plaintiff that the application could not be processed because the documents were incomplete. The first defendant requested the plaintiff to forward the same documents requested through the State Health Office on 26 December 2000, as soon as possible together with the requisite payment. The plaintiff sent all these on 22 February 2001. Finally, by a letter dated 6 December 2001, the first defendant approved the renewal of the plaintiff's

A licence for the period of 30 September 2000 to 29 September 2001. The plaintiff claimed that between the period of 30 September 2000 to 29 September 2001, it was unable to operate its hospital since the first defendant had failed to renew its licence, despite the plaintiff having fulfilled all the requirements. The plaintiff thus sued the defendants alleging B negligence in their failure to issue the licence promptly.

Held, allowing the plaintiff's claim with costs:

C (1) The plaintiff as an operator of an ongoing licensed private hospital required its licence to be renewed on a yearly basis. If the licence is not renewed by the first defendant promptly, the plaintiff would not be able to operate its hospital legitimately. A duty of care at common law therefore exists on the part of the first defendant to ensure that the D licence was issued to the plaintiff in due time (see para 19).

(2) Clearly the first defendant had not acted with reasonable promptitude. It only approved the licence more than a year after the date of application and after the expiry of the licence applied for. Specifically, the first defendant was negligent in processing the plaintiff's licence by: E (a) requesting the plaintiff to furnish the relevant documents only on 26 December 2000 when it could and should have acted sooner; (b) acting only six weeks later (on 12 February 2001) to notify the plaintiff that its application could not be processed because of incomplete documentation and by again requesting the same documents supplied F earlier by the plaintiff through the District Health Office; and (c) deciding to approve and issue the licence some 10 months after the plaintiff complied with the request in the first defendant's letter of 12 February 2001. The first defendant had abdicated his responsibility to properly process the plaintiff's application (see paras 22–23).

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(3) It was indisputable that the plaintiff would not be able to continue to operate the hospital on a legitimate basis unless it was licensed to do so. Therefore it must be presumed that the plaintiff would have suffered some loss and damages in failing to obtain the licence on time H (see para 24).

[Bahasa Malaysia summary

Plaintif merupakan sebuah hospital swasta. Ia telah memohon kepada I defendan pertama untuk pembaharuan lesennya untuk, antara lain, tempoh dari 30 September 2000 hingga 29 September 2001. Plaintif telah membuat permohonannya pada 1 September 2000 melalui borang yang berkenaan. Pada 8 Disember 2000 defendan pertama telah membuat tinjauan ke atas premis plaintif dan pada 14 Disember 2000, Pegawai Kesihatan Daerah —

seorang pegawai kepada defendan pertama — telah mengesahkan bahawa premis plaintif adalah sesuai untuk kegunaan sebagai hospital swasta. Pada 26 Disember 2000, Pegawai Kesihatan Negeri telah meminta daripada plaintif beberapa dokumen, iaitu sijil sah pencegahan kebakaran dan salinan kad-kad pengenalan pembantu perubatan plaintif. Plaintif telah menghantar dokumen-dokumen tersebut melalui Pejabat Kesihatan Daerah pada 25 Januari 2001. Namun, pada 12 Februari 2001, defendan pertama memaklumkan kepada plaintif bahawa permohonan itu tidak dapat diproses kerana dokumen-dokumen tidak lengkap. Defendan pertama meminta plaintif mengemukakan dokumen-dokumen sama yang diminta melalui Pejabat Kesihatan Daerah pada 26 Disember 2000, secepat mungkin bersama dengan bayaran permohonan. Plaintif telah menghantar kesemua ini pada 22 Februari 2001. Akhirnya, melalui sepucuk surat bertarikh 6 Disember 2001, defendan pertama telah meluluskan pembaharuan lesen plaintif untuk tempoh 30 September 2000 hingga 29 September 2001. Plaintif mendakwa bahawa antara tempoh 30 September 2000 hingga 29 September 2001, ia tidak dapat beroperasi kerana defendan pertama telah gagal untuk memperbaharui lesennya, meskipun plaintif telah memenuhi kesemua keperluan. Plaintif dengan itu telah menyaman defendan-defendan dengan mendakwa kecuaian kerana kegagalan mereka mengeluarkan lesen dengan segera.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif sebagai pengendali hospital swasta berlesen dikehendaki memperbaharui lesennya setiap tahun. Sekiranya lesen itu tidak diperbaharui oleh defendan pertama dengan segera, plaintif tidak akan dapat menjalankan operasi hospitalnya dengan sah. Satu kewajipan berjaga-jaga di sisi *common law* oleh itu wujud di pihak defendan pertama untuk memastikan agar lesen itu dikeluarkan kepada plaintif dalam tempoh sewajarnya (lihat perenggan 19).

(2) Adalah jelas defendan pertama tidak bertindak dengan kesegeraan yang munasabah. Ia hanya meluluskan lesen itu lebih daripada setahun selepas tarikh permohonan dan selepas luput tarikh lesen yang dipohon. Lebih spesifik, defendan pertama telah cuai dalam memproses lesen plaintif kerana: (a) meminta plaintif mengemukakan dokumen-dokumen relevan hanya pada 26 Disember 2000 walhal ia boleh dan sepatutnya bertindak lebih awal; (b) bertindak hanya enam minggu kemudian (pada 12 Februari 2001) untuk memaklumkan kepada plaintif bahawa permohonannya tidak boleh diproses kerana dokumen yang tidak lengkap dan dengan meminta sekali lagi dokumen-dokumen sama yang telah dikemukakan sebelumnya oleh plaintif melalui Pejabat Kesihatan Daerah; dan (c) memutuskan untuk

meluluskan dan mengeluarkan lesen itu lebih kurang 10 bulan selepas plaintif memenuhi permintaan dalam surat defendan pertama bertarikh 12 Februari 2001. Defendan pertama telah melepaskan tanggungjawabnya untuk memproses permohonan plaintif dengan betul (lihat perenggan 22–23).

(3) Ia tidak dipertikaikan bahawa plaintif tidak akan dapat meneruskan operasi hospital tersebut secara sah kecuali ia mempunyai lesen untuk berbuat sedemikian. Oleh itu ia perlu diandaikan bahawa plaintif telah mengalami kehilangan dan kerugian kerana gagal memperoleh lesen itu dengan segera (lihat perenggan 24).]

Notes

For cases on damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 936–950.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on negligence of public authorities, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1795–1801.

Cases referred to

Anns & Ors v London Borough of Merton [1977] 2 All ER 492 (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567 (refd)

Caparo Industries Plc v Dickman & Ors [1990] 1 All ER 568 (refd)

Legislation referred to

Private Hospitals Regulations 1973 reg 3(4)

M Manoharan (M Manoharan & Co) for the plaintiff.

Narkunavathy Sundareson (Senior Federal Counsel, Attorney-General's Chambers) for the defendants.

Kang Hwee Gee J:

[1] This is my oral judgment.

[2] The plaintiff's claim against the defendants is for loss and damages incurred by the plaintiff by the failure of the first defendant to issue a private hospital licence for the following period initially:

(i) 30 September 1997 to 29 September 1998;

(ii) 30 September 1998 to 29 September 1999;

(iii) 30 September 1999 to 29 September 2000;

(iv) 30 September 2000 to 29 September 2001; A

(v) 30 September 2001 to 29 September 2002.

[3] The plaintiff restricts its claim for the period 30 September 2000 to 29 September 2001. B

[4] The parties agreed that since the facts are not disputed, the trial should proceed merely by submissions based on an agreed statement of facts as follows: C

1 The plaintiff, a private hospital.

1.1 The Plaintiff had applied for renewal of licences under s 3 of the Private Hospital Act 1971 as follows: D

(a) On 25 February 1998 — application for the first licence for the year 30 September 1997–29 September 1998;

(b) On 12 September 1998 — application for the second licence for the year 30 September 1998–29 September 1999; E

(c) On 13 October 1999 — application for the third licence for the year 30 September 1999–29 September 2000;

(d) On 1 September 2000 — application for the fourth licence for the year 30 September 2000–29 September 2001; F

(e) On 22 February 2001 — application for the fifth licence for the year 30 September 2001–29 September 2002.

1.2 There was non-issuance by the first defendant for the first and second licences from 1997–1999. G

1.3 The first defendant issued the licences as follows:

(a) the third licence for year 30 September 1999–29 September 2000 on 18 February 2000; H

(b) the fourth licence for year 30 September 2000–29 September 2001 on 11 May 2001 but was only given to the plaintiff on 6 December 2001;

(c) the fifth licence for year 30 September 2001–29 September 2002 on 11 May 2001. I

1.4 The plaintiff did not obtain a licence from the first defendant from 30 September 1997 to 18 February 2000 and from 30 September 2000 to 6 December 2001.

A 3 Both parties have agreed that this case proceeds by way of submission on points of law based on the agreed facts and documents.

THE PLAINTIFF'S SUBMISSION

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[5] The plaintiff applied for renewal for the period 30 September 2000 to 29 September 2001 in compliance with reg 3(4) of the Private Hospitals Regulations 1973 which read as follows:

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> Subject to section 6 of the Act, a licence issued or renewed under these Regulations shall be valid for a period of one year from the date of issue or renewal, as the case may be, and an application for the renewal of a licence shall be made within one month before the date of expiry.

D **[6]** The plaintiff made the application on 1 September 2000 (admitted) in the requisite Form A and the requisite fee later.

[7] On 8 December 2000 the first defendant conducted an inspection of the plaintiff's premises ('the hospital').

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[8] On 14 December 2000 an officer of the first defendant — Pegawai Kesihatan Daerah Gombak made a certification on the Form A at p 7 under the column 'Untuk Kegunaan Pejabat Sahaja' as follows: 'Saya telah memeriksa premis di atas dan didapati *layak* untuk digunakan sebagai F Hospital Persendirian.'

[9] On 14 December 2000 the Gombak District Health Office forwarded the plaintiff's documents stating that they have no objection to the application for renewal to the State Health Department.

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[10] On 26 December 2000 the first defendant's State Office, Jabatan Kesihatan Negeri Selangor issued a request to the plaintiff by a cc copy letter to the plaintiff to furnish a valid fire prevention certificate and copies of nursing aides' identity cards. H

[11] On 25 January 2001 the plaintiff furnished the following documents as requested to the Gombak District Health Office:

(i) Fire prevention certificate for the year 2001;

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(ii) copies of the identification cards of all the nursing aides; and

(iii) X-ray radar certificate.

[12] On 12 February 2001 the first defendant notified the plaintiff that the application could not be processed because the documents were incomplete and requested the plaintiff to forward the following documents as soon as possible together with the payment which the plaintiff did on 22 February 2001:

(1) copies of the nursing aides' identity cards (which had been supplied);

(2) a valid fire prevention certificate (also supplied).

[13] Ultimately by a letter dated 6 December 2001 the first defendant approved the renewal of the licence for the period 30 September 2000 to 29 September 2001.

[14] The plaintiff claims that between the period 30 September 2000 and 29 September 2001 it was unable to operate the hospital by reason that the first defendant had failed to renew the licence despite the plaintiff having fulfilled all the requirements.

THE DEFENCE'S SUBMISSION

[15] The Director General has full power to issue the licence in respect of private hospitals. In this case the application forwarded by the plaintiff was incomplete in that:

(i) it failed to furnish the fire prevention certificate and copies of the nursing aides' identity cards as at 26 December 2000;

(ii) it failed to furnish fire prevention certificate, copies of the nursing aides' identity cards and X-ray machines certificate as at 12 February 2001.

It was only on 22 February 2001 that the plaintiff was able to furnish the documents and made the payment and thereafter the application for licence was processed and a licence dated 11 May 2001 was issued for the period 30 September 2000 to 29 September 2001.

[16] In any case the defendants submit the plaintiff did not suffer any damages as it continued to operate as a maternity home and deliver babies. See Bundle B admitted Tab 33 statistics compiled by Bandaraya showing that it delivered babies during this period.

[17] The Director General (first defendant) had discharged his duties in issuing the licence responsibly and was not negligent in failing to do so for the period 30 September 2000 to 29 September 2001. He could only issue the licence if all the documents were made available to him. The certification by the District Health Officer, Dr Ruhaini Dato' Haji Ismail is only in respect

of the premises but not as to its amenities or its personnel. The certification need not necessarily lead to the issuance of the licence.

FINDINGS

[18] To sustain an action in negligence the plaintiff must prove:

(i) a duty of care was owed to it by the defendants;

(ii) that there was a breach of duty of care; and

(iii) that in consequence thereof it suffered damages.

See *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567.

[19] The duty of care in this case is with respect to the duty of the first defendant to process the plaintiff's renewal of its private hospital licence. The first defendant would be failing in its duty of care if it fails to process that application in due course without delay barring any unpreventable impediment that it may encounter.

[20] See *Caparo Industries Plc v Dickman & Ors* [1990] 1 All ER 568 as approved and applied in the *Arab-Malaysian Finance Bhd*:

> The three criteria for imposition of duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. In determining whether there was a relationship between the parties the court guided by situation in which the existence, scope and limit of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered was the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that the duty of care existed.

[21] See *Anns & Ors v London Borough of Merton* [1977] 2 All ER 492 where it was held that a statutory body conferred with the power to supervise may owe a duty of care at common law.

Whether there was a duty of care

[22] The plaintiff is an operator of an ongoing licensed private hospital which required its licence to be renewed on a yearly basis. If the licence is not renewed by the first defendant promptly the plaintiff could not be in a position to operate its hospital legitimately. A duty of care at common law therefore exists on the part of the first defendant to ensure that the licence was issued to the plaintiff in due time.

Whether there was a breach of duty of care on the part of the first defendant A

[23] The plaintiff's licence was due to expire on 29 September 2000 and it made the application to renew on 1 September 2000 by submitting the requisite Form A. It is clear from Form A at p 7 under the column 'Untuk Kegunaan Pejabat Sahaja' that the Pegawai Kesihatan Daerah Gombak had certified that he had inspected the plaintiff's premises and had found it fit for use as a private hospital on 14 December 2000. On the same day the Gombak District Health Office forwarded the application to the State Health Department. B C

[24] The certification by the Pegawai Kesihatan Daerah Gombak that the plaintiff's premises was fit for use as a private hospital notwithstanding, it was still open to the first defendant to request the plaintiff to furnish any such information or to comply with any further condition deemed necessary for the operation of the hospital provided that the request was made bona fide and without delay, bearing in mind always that there is urgency for the plaintiff to obtain the licence in order to continue to operate the hospital legitimately. D E

[25] Having heard the evidence and considered the submission of the parties, it is clear to me that the first defendant had not acted with reasonable promptitude having only approved the licence more than a year later from the date of application after the expiry of the licence being applied for. Specifically, I find the first defendant was negligent in processing the plaintiffs licence by: F

(a) requesting the plaintiff to furnish the fire prevention certificate and copies of the nursing aides' identity cards only on 26 December 2000 when he could and should have acted sooner; G

(b) acting only six weeks later (on 12 February 2001) to notify the plaintiff that its application could not be processed because of incomplete documentation and by again requesting for the same fire prevention certificate and copies of the nursing aides' identity cards which had been supplied earlier by the plaintiff to the first defendant through the Pejabat Kesihatan Daerah Gombak; H

(c) deciding to approve and to issue the licence some 10 months later, after the plaintiff had complied with the request in the first defendant's letter of 12 February 2001. I

[26] Having received the plaintiff's application Form A, the first defendant should have been in a position to make a general assessment of what he required to enable him to process the application and should he require any

A further information or documents from the plaintiff, this ought to be communicated to the plaintiff without delay bearing in mind the urgency of the matter. The fact that the first defendant had requested for the same documents again by the letter dated 12 February 2001 when it is clear that the plaintiff had already submitted them earlier and that he only decided to B approve it some 10 months later indicate clearly that the first defendant had abdicated his responsibility to properly process the plaintiffs application.

Did the plaintiff suffer damages

C **[27]** It is indisputable that the plaintiff would not be able to continue to operate the hospital on a legitimate basis unless it was licensed to do so. That it must have suffered some loss and damages in failing to obtain the licence on time must be presumed under the circumstances. This third element is to be distinguished from the quantum of damages which the D plaintiff is required to prove before the sum can be awarded.

DECISION

E **[28]** For the foregoing reasons I find the first defendant liable in negligence in failing in its duty of care to act with reasonable promptitude to process the plaintiff's application for the licence for the period 30 September 2000 to 29 September 2001. The second defendant being the employer of the first defendant is vicariously liable for the act of the first defendant.

F **[29]** As agreed, quantum will be assessed by the senior assistant registrar. For guidance in assessing damages the senior assistant registrar should base his assessment on the profit and loss account of previous years as submitted to the Suruhanjaya Syarikat Malaysia.

G **[30]** The plaintiff is entitled to the costs of this suit.

Plaintiff's claim allowed with costs.

H Reported by Andrew Christopher Simon

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